

Statement of Kevin Gover, Assistant Secretary-Indian Affairs,
U.S. Department of the Interior
on H.R. 3782, Tribal Trust Fund Settlement Act of 1998,
Before the Senate Committee on Indian Affairs and the
House Committee on Resources
July 22, 1998

Good morning, Chairman Campbell, Chairman Young and members of the Committees. I am pleased to present the views of the Department of the Interior (Department) on H.R. 3782, a bill to compensate certain Indian tribes for known errors in their tribal trust fund accounts, to establish a process for settling other disputes regarding tribal trust fund accounts, and for other purposes.

For nearly 70 years, Congress, the General Accounting Office, Tribes and Tribal organizations, as well as the Department, have identified deficiencies in the federal government's management of trust funds and the underlying trust assets. There have been sporadic efforts' over the years to improve the automated systems, but until now, there has never been the resource commitment necessary to keep pace with the task.

Secretary Babbitt and the Clinton Administration have pledged that with Congress' support, these automated systems will be fixed. The momentum for doing this was initiated by the enactment of the American Indian Trust Fund Management Reform Act of 1994 (the " 1994 Act"). Congress, for the first time, more specifically delineated the federal government's trust fund management obligations and put in place a framework for reforming the accounting and management systems, within the Act.

The Department's Trust Fund Initiatives

There are three components to the Administration's trust funds initiative. First, in conjunction with the Special Trustee for American Indians, we have developed recommendations for improving the underlying trust management and accounting systems, and are in the process of implementing those improvements. This initiative, known as the Trust Funds Management Improvements Project (Project), involves 13 separate tasks and includes data cleanup, new trust asset and accounting systems, and coordinated efforts to address appraisals, probate, and record management systems. The effort, already underway, has been planned to move us quickly to complete these improvements.

Second, we have developed legislation to address one of the root causes of our trust asset management difficulties -- the increasing fractionation of ownership of Indian allotted lands. As land passes from one generation to the next and the number of owners of each parcel increases, the Department's ability to keep track of each owner and properly account for each owner's interest becomes more difficult and more expensive. Moreover, this fractionation of interests undermines the economic vitality of allottee-owned land because potential lessees do not want to deal with scores or even hundreds of owners on an individual parcel of land. We appreciate Chairman Young's sponsorship of the Administration's proposal to address the fractionation issue -- H.R. 2743 -- and we urge Congress to address the issue at its earliest opportunity.

The third component of the Administration's trust funds initiative is embodied in H.R. 3782. That

legislation is designed to put in place a process to address claims that Tribes may have with regard to the Department's past management of Tribal trust fund accounts. I would like to take a few moments this morning to describe the proposal and explain why we believe it represents a balanced approach for addressing Tribal claims.

The Reconciliation Project

The 1994 Act directs the Secretary to reconcile the balances of the tribal trust fund accounts and provide your Committees with a description of how the Secretary proposes to resolve any disputes with Tribes about those balances. The Department initiated the reconciliation process even before passage of the 1994 Act: in 1990, the Department awarded a contract to Arthur Anderson LLP, to undertake the Tribal Trust Fund Reconciliation Project under the supervision of the Department. The Project's basic reconciliation procedures encompassed the reconstruction of \$17.7 billion in non-investment transactions, of which \$15.3 billion -- about 86 percent -- were reconciled. For the reconciled transactions, approximately \$1.87 million in transactions were found to be in error -- an error rate of .01 percent. The remaining 14 percent of the transactions (\$2.4 billion) were deemed to be "unreconciled," meaning that the Department could not locate all source documents required under the Reconciliation Project procedures to verify the accuracy of the general ledger entry for the transactions within the time frame allotted to the reconciliation process. After Arthur Andersen completed its work, the Department continued its efforts to reconcile tribal accounts through the services of another independent accounting firm, which employed the same reconciliation procedures used by Arthur Andersen. These further efforts reduced the value of unreconciled transactions to about \$1.97 billion. This does not mean that the \$1.97 billion is lost or missing. It does indicate, however, that the poor condition of the records and systems did not allow the Federal government to conduct a complete audit or provide the level of assurance to account holders that was expected.

Because of the complexities of the reconciliation, the Department believes that the best way to resolve disputes regarding Tribal trust account balances is through legislation. H.R. 3782 contains the process that we believe best meets the interests of the Tribes and the federal government. Our proposal is the product of two rounds of consultations with Tribes, including eight public meetings around the country and the opportunity to file written comments. While we recognize that there are a number of different ways to address these issues, I will describe our proposal and why we believe that it would serve the interests of most Tribes that may want to assert claims against the government.

The Legislative Proposal

The legislation that we propose seeks to settle claims relating to the Department's management of Tribal trust funds for at least the period July 1, 1972 through September 30, 1992, and at the Tribes' option, for the period after 1992 through the date of settlement. The hallmark of our proposal is its focus on a Tribe-by-Tribe, government-to-government settlement process which would take into account the specific circumstances and claims of each Tribe.

Each tribe has been provided with a report describing the results of the Department's Reconciliation efforts. Under our settlement proposal, the government would identify all errors that we found in the Reconciliation Project ("known errors"), and we would credit the Tribes' accounts where money was

found to be owed, on a net basis, with compound interest, as soon as possible. Because the government, as trustee, is obligated to correct its errors, these payments would be made notwithstanding a Tribe's willingness to settle its other claims.

The proposal then recommends a two-stage settlement process for resolving accounting claims other than those relating to known errors. First, the government would offer each Tribe the opportunity to settle claims immediately for a specific sum based on a formula that would take into account the particular characteristics of the Tribe's accounts. If the Tribe accepts the offer, claims would be settled by payment according to the formula, and the matter would be closed. If the Tribe does not accept the offer, it would be withdrawn and stage one would be concluded.

In stage two, Tribes would have the opportunity to engage in government-to-government, non binding settlement negotiations with a mediator. As part of the negotiations, there would be an opportunity to obtain additional data or undertake additional analysis to the extent it would be constructive in reaching a satisfactory resolution of claims. If the mediation process is successful, Tribes would be paid according to the terms of the settlement. If not, a Tribe would be authorized to file a claim in the United States Court of Federal Claims within the parameters defined by Congress in the legislation.

Our proposal puts in place a process for settling claims; it does not impose a settlement on anyone. Tribes that are satisfied with their settlements can accept them. Those that are not can litigate.

We place a great deal of emphasis on informal dispute resolution without taking away the right to litigate claims in court if those efforts are not successful. We would pay known errors immediately and also place on the table a settlement offer which Tribes would be free to accept or reject. Our goal is to pay legitimate claims to Tribes as quickly as possible without incurring the high transaction costs that are often associated with litigation. Tribes which believe the settlement offer fairly resolves its claims will take it. Those who do not would be free to reject it and move on to the next stage of informal, non-binding mediation.

This is particularly important for the vast majority of Tribes that have a relatively small amount of money at issue. There are roughly 114 Tribes that account for 98% of the unreconciled transactions. We believe that the bulk of the 196 remaining Tribes, with only 2% of the unreconciled transactions, will be more interested in obtaining redress quickly and informally -either by taking our initial settlement offer or a settlement offer developed in mediation -- without incurring large attorney and accounting fees. Our approach will allow that to happen.

For Tribes who are dissatisfied with the Department's offer, they will have their day in court. However, the Department will have every incentive to place a favorable settlement offer on the table. If settlement can be reached, both the Tribe and the government would be spared the distraction and cost of extensive litigation.

This settlement proposal also focuses on those areas where we have the greatest likelihood of

achieving a settlement because we already know as much about the state of the accounts as we are likely to know. Our proposal focuses on the period of the Reconciliation Project -- July 1, 1972 through September 30, 1992 -- and up to the date of settlement if a Tribe desires to settle through that date. We already have spent \$21 million learning what we can about the state of the accounts for that period. Using that analysis as our base, we expect to reach settlements quickly and fairly.

Other proposals that we have seen purport to settle claims going back hundreds of years and include not only claims relating to accounting and management of trust money, but those relating to management of the underlying assets as well. While we have serious doubts about the government's potential liability going back that far, H.R. 3782 does not seek to resolve this issue. This legislation would not extinguish any claims other Tribes may believe they have for the pre 1972 period, nor would it diminish the Tribes' ability to bring lawsuits on such claims.

The same is true with respect to asset management claims. Other than occasional anecdotal statements, we have absolutely no data suggesting that Tribal assets were systematically mismanaged and have no reason to believe that they were. Moreover, given the large number of variables involved in evaluating such claims -- including the type of asset, the period of time, the length of a contract or lease, the geographic region and the state of the market at the time, just to name a few -- these types of claims do not appear to lend themselves to resolution by any means other than individual adjudication. For these reasons, our legislative proposal would not extinguish such claims.

What we are trying to avoid is a repeat of the Indian Claims Commission process, which was intended to be a relatively fast, informal and inexpensive means of resolving Tribal claims. It turned out not to be fast -- the last few claims are now being resolved, 50 years later. Nor was it informal and inexpensive. Trying to solve all claims of every nature with no parameters was an approach that was tried before that didn't work. Our proposal tries to avoid past mistakes.

I also want to clarify that this legislation does not affect any Tribal trust fund litigation filed in court on or before November 12, 1997. Nor is it intended to settle or solve potential IIM claims, or to limit the government's potential liability with regard to any such claims, which are currently the subject of a class action lawsuit entitled *Elouise Pepion Cobell et al. V. Bruce Babbitt et al.*. We understand concerns have been expressed by the Indian community regarding Sections 15 and 16 of H.R. 3782. Both our December 1996 and November 1997 reports to Congress recommended the inclusion of these provisions.

Section 15 is largely aimed at correcting the overall books of the Government, to ensure that the balances in U.S. Treasury Accounts equal the underlying positive balances in both individual and tribal trust fund accounts. The Department's and the Treasury's books are not in agreement as a result of historic inadequacies in systems, policies, practices, and procedures. Correction of these book differences is an integral part of our trust reform efforts. For the most part, we expect these provisions to result in aggregate account level adjustments. Potentially, they could result in some adjustments to an underlying account. However, we do not expect such adjustments to be significant. Section 16 provides a mechanism to address routine administrative errors prospectively.

I believe that H. R. 3782 will provide a process to address claims relating to the past management

of Tribal trust funds. This concludes my statement. I will be happy to answer any questions you may have.